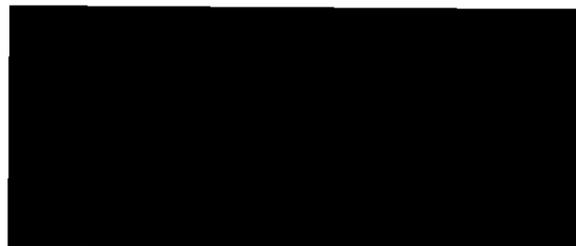


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



B6

Date: **FEB 01 2012**

Office: NEBRASKA SERVICE CENTER

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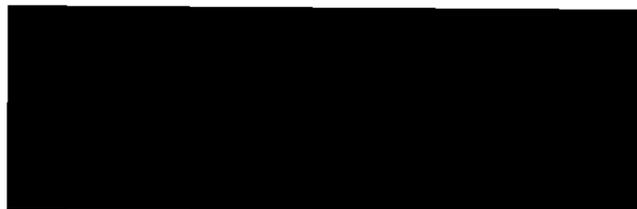
IN RE:

Petitioner: 

Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. It then came before the Administrative Appeals Office (AAO) on appeal. On November 15, 2011, this office provided the petitioner with notice of derogatory information and request for evidence (NDI/RFE) in the record and afforded the petitioner an opportunity to provide evidence that might overcome this information. The petitioner failed to respond to the NDI/RFE. Thus, the appeal will be dismissed.

The petitioner is a computer programming and international trade business. It seeks to employ the beneficiary permanently in the United States as an accountant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3). As required by statute, a labor certification approved by the Department of Labor accompanied the petition. The director denied the petition because the petitioner had not established that the beneficiary had four years of college education in business, management or accounting and two years of experience in the job offered as required by the Form ETA 750.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On November 15, 2011, this office notified the petitioner that according to the records at the California Secretary of State, the petitioner has been suspended in the state of California. *See*

If the petitioner is currently suspended, this is material to whether the job offer, as outlined on the immigrant petition filed by this organization, is a *bona fide* job offer. Moreover, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.) It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Id.*

The AAO's NDI/RFE also stated as follows:

Under 20 C.F.R. § 656.20(c)(8) and § 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity

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<sup>1</sup> The AAO noted that an entity's powers, rights and privileges may be suspended in California 1) by the Franchise Tax Board for failure to file a return and/or failure to pay taxes, penalties, or interest; and/or 2) by the Secretary of State for failure to file the required Statement of Information and, if applicable, the required Statement by Common Interest Development Association. *See*

is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). On March 30, 2001, you signed the Form ETA 750 on behalf of the petitioner as its President. On April 16, 2007, you also signed the Form I-140 on behalf of the petitioner. The beneficiary is your wife, Simona Covaci. Therefore, it appears that the beneficiary and the petitioner may be related.<sup>2</sup> For the years 2003, 2004, 2005, 2006, 2007, 2008, 2009 and 2010, please provide the names of your organization’s shareholders, officers and directors, and detail each individual’s relationship to the beneficiary.<sup>3</sup> In addition, for tax years 2003 and 2004, please provide a copy of the statement that was attached to your federal income tax returns indicating the name of your organization’s sole shareholder.<sup>4</sup> Please provide evidence to establish that the petitioner has made a *bona fide* job offer to the beneficiary and that the relationship between the petitioner and the beneficiary, if one exists, was disclosed to the United States Department of Labor (DOL) during labor certification proceedings. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm’r 1986).<sup>5</sup>

In order to establish the extent to which a relationship between the petitioner and the beneficiary was disclosed to the DOL during labor certification proceedings, this office requests a complete copy of the Form ETA 750 as certified by the DOL, including copies of your correspondence with the DOL during the labor certification process and any documentation that both reflects and summarizes your organization's recruitment efforts.<sup>6</sup> USCIS must be in receipt of the complete Form ETA 750 as certified by the DOL, including any attachments which the DOL incorporated into that form, before the petition may be approved. *See* section 203(b)(3)(C) of the Act; *see also* 8 C.F.R.

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<sup>2</sup> We note that on May 17, 2006, your wife signed a Form ETA 750 as Vice President of your organization. You were the beneficiary of that Form ETA 750, and you signed the Form I-140 filed by your organization on your behalf.

<sup>3</sup> Your federal income tax returns indicate that [REDACTED] were paid officer compensation in 2003, 2005 and 2006. For tax years 2003 and 2004, Schedule K to your organization’s IRS Form 1120 indicates that your organization was owned by one shareholder. For tax years 2005 and 2006, Schedule K to your organization’s IRS Form 1120 indicates that no shareholder owned 50% or more of the company’s voting stock.

<sup>4</sup> Schedule K to IRS Form 1120 instructs the taxpayer to provide the name and identifying number of that shareholder on a separate statement.

<sup>5</sup> We note that the AAO may invalidate the labor certification based on fraud or willful misrepresentation. *See* 20 C.F.R. § 656.31(d). While you may withdraw the appeal, withdrawal will not prevent a finding that you have engaged in fraud and the willful misrepresentation of material facts.

<sup>6</sup> For example, advertisements, posting notices, results of recruitment report, correspondence to DOL, etc.

§ 204.5(a)(2)(which mandates that the Form I-140 be accompanied by the individual labor certification *as certified by the DOL*)(emphasis added).<sup>7</sup>

In addition, the director denied the petition because the petitioner had not established that the beneficiary had four years of college education in business, management or accounting and two years of experience in the job offered as required by the Form ETA 750. On appeal, counsel for your organization submits a letter dated December 11, 2007, from [REDACTED] of the Consulate General of Romania in Los Angeles, California, with English translation, stating that the beneficiary graduated with a “Master’s Degree in Accounting-Finance (five years college education)” and that she was employed as a chief accountant with [REDACTED] in Bucharest, Romania from November 1992 through March 1997.<sup>8</sup> The letter states that the following documents were presented to the Consulate General of Romania: the beneficiary’s master’s degree diploma granted by “Dunarea de Jos” University of Galati, Romania on March 24, 1992; a Certificate of Achievement as a Certified Accountant issued by the Ministry of Education-Advisory College of Accounting, Bucharest, Romania; and a letter dated April 14, 1997, from [REDACTED] General Manager of [REDACTED] Bucharest, Romania, confirming the beneficiary’s employment as a chief accountant from November 1992 through March 1997. However, the petitioner did not submit these three documents on appeal. Please provide the beneficiary’s master’s degree diploma from the University of Galati; her Certificate of Achievement as a Certified Accountant issued by the Ministry of Education-Advisory College of Accounting, Bucharest, Romania; and the letter dated April 14, 1997, from [REDACTED] General Manager of [REDACTED] in Bucharest, Romania, confirming the beneficiary’s employment as a chief accountant from November 1992 through March 1997.

On appeal, the petitioner also provides the beneficiary’s monthly paystubs issued by [REDACTED] in Bucharest, Romania between November 1992 and March 1997. The documents are virtually identical to those submitted in support of your organization’s I-140 petition on your behalf, although the employee name and amounts of pay have been changed. The engineering diplomas from the University of Galati and the transcript translations submitted in support of the instant petition and the I-140 petition submitted by your organization on your behalf are also very similar. It appears that both of you took exactly the same courses during all five years of study at the University of Galati. Please explain the similarities in the documents.

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<sup>7</sup> Under DOL’s regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. *See* 20 C.F.R. § 656.30(d).

<sup>8</sup> Your organization also submitted with the I-140 petition submitted by your organization on your behalf, a letter dated November 17, 2007, from Ovidiu Greca of the Consulate General of Romania in Los Angeles, California, with English translation, stating that you were employed by [REDACTED] in Bucharest, Romania from November 1992 through 1997.

The NDI/RFE also stated:

Further, beyond the decision of the director, this office requests that you provide evidence that your organization had the ability to pay the proffered wage in 2007, 2008, 2009 and 2010. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

Here, the Form ETA 750 was accepted on April 25, 2003. The proffered wage as stated on the Form ETA 750 is \$5,425.33 per month (\$65,103.96 per year). Please provide complete copies of your organization's federal income tax returns, annual reports or audited financial statements for tax years 2007, 2008, 2009 and 2010.

Finally, please provide a copy of your organization's Articles of Incorporation and copies of all Statements of Information submitted to the California Secretary of State since the company's incorporation on December 3, 1999.<sup>9</sup>

This office allowed the petitioner 30 days in which to respond to the NDI/RFE. More than 30 days have passed and the petitioner has failed to respond to the NDI/RFE. The AAO specifically alerted the petitioner that failure to respond to the NDI/RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Thus, the appeal will be dismissed.<sup>10</sup>

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>9</sup> California Corporate Code § 1502(a) states in pertinent part:

Every corporation shall file, within 90 days after the filing of its original articles and annually thereafter during the applicable filing period, on a form prescribed by the Secretary of State, a statement containing all of the following:

- (1) The names and complete business or residence addresses of its incumbent directors.
- (2) The number of vacancies on the board, if any.
- (3) The names and complete business or residence addresses of its chief executive officer, secretary, and chief financial officer.
- (4) The street address of its principal executive office.
- (5) The mailing address of the corporation, if different from the street address of its principal executive office.
- (6) If the address of its principal executive office is not in this state, the street address of its principal business office in this state, if any.
- (7) A statement of the general type of business that constitutes the principal business activity of the corporation (for example, manufacturer of aircraft; wholesale liquor distributor; or retail department store).

<sup>10</sup> Additionally, even if the appeal could be otherwise sustained, the petition's approval may be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.